Metro Gain Sdn Bhd v Commerce Assurance Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–83 OF 2007
GUNALAN MUNIANDY JC
25 NOVEMBER 2011

Insurance — Fire insurance — Repudiation of liability — Failure to give notice — Insurance policy taken by textile manufacturer against risks of fire and fire consequential losses — Insured failing to give insurer notice of loss within 15 days as required in policy — Whether insurer entitled to repudiate liability

Insurance — Fire insurance — Repudiation of liability — Fraudulent claims — Insurance policy taken by textile manufacturer against risks of fire and fire consequential losses — Losses incurred resulting from fire — Insured making fraudulent claim which was grossly exaggerated — Insured using fake or falsified documents in making claim — Whether insurer entitled to repudiate liability

Insurance — Fire insurance — Repudiation of liability — Non-disclosure — Insurance policy taken by textile manufacturer against risks of fire and fire consequential losses — Losses incurred resulting from fire — Stocks and sewing machines stacked very closely and in an unusual way such as to greatly increase the risk of destruction by fire — Insured altering trade or nature of occupation of building insured — Whether insurer entitled to repudiate liability

The plaintiff was a textile manufacturer who was insured against risks of fire and fire consequential losses under two policies (the FMD Policy and the FCL Policy) issued by the defendant, an insurance company. The plaintiff sustained losses as a result of a fire that took place at its textile factory. The defendant, after investigation, gave notice to the plaintiff repudiating liability to pay compensation. Hence, this suit was to compel the defendant to pay compensation to the plaintiff for the losses insured against. The defendant averred that the repudiation of liability was valid on the ground that the plaintiff had infringed conditions 9(a), 12 and 15 of the first policy (FMD policy) and conditions 8(c) and 12 of the second policy (FCL policy). The allegation of breach of these conditions was by reason of the defendant stacking stocks and sewing machines very closely and in an unusual way such as to greatly increase the risk of destruction by fire without proper written sanction from the defendant. The plaintiff was also said to have altered the trade or manufacture carried on or/nature of occupation of the building insured. According to the defendant, the plaintiff had breached condition 12 by

including in their claim 'profit of any kind' by adding in it import duties and sales tax deliberately knowing that they were not entitled to this claim as they had been exempted from such tax/duty. The defendant also claimed that the plaintiff had breached the said conditions 15 and 12 by using fraudulent means or devices in support of their claim and/or had submitted a fraudulent claim that is grossly exaggerated and/or had occasioned the loss by its agents' willful act or connivance. According to the defendant, since the plaintiff had used fake or falsified documents, the defendant was entitled to repudiate liability under the above provisions.

Held, dismissing the suit with costs:

(1) The plaintiff's failure to duly notify the defendant of the alteration in the circumstances of occupancy was a concealment of the actual status of the business which constituted a breach of the clear terms of condition 9(a) of the FCL Policy. This by itself entitled the defendant to repudiate liability. There was an obvious change in circumstances pertaining to occupation of the premises as to which the defendant had not been duly notified. It did not concern coverage of the policy but that the main activity for which the premises were occupied had ceased and a large quantity of machinery was left stacked and idle. This was definitely a change in circumstances that required notification (see paras 11–12).

(2) The insured had first to forthwith give notice to the insurer when a loss or damage happened and within 15 days after that, or such further time that the insurer may allow, submit a written claim for the loss or damage. Where notice has been made a condition precedent for a claim under a policy, the insurer would be right to deny liability if it is not strictly complied with. In order to avoid liability under the policy in this instance, no necessity in law is imposed on the insurer to show that he has been prejudiced by the said non-compliance of due notice. The late submission of the claim, well in excess of the 15 day deadline, without further time being given by the defendant, was a clear-cut breach of condition 12 that certainly gave defendant the right to repudiate liability on this ground alone (see paras 13–14 & 16).

(3) Condition 12 explicitly stipulated that the claim should be for loss or damage that happened. It was wrong for the plaintiff to claim for import duties that may be imposed when in all likelihood, it may not be imposed as the plaintiff was exempted from paying the duties. By the same token, there was no question of sales tax being imposed. Hence, the assertion that the plaintiff had included 'profit of any kind' in their list of claim had been made out and had, thereby, clearly infringed condition 12 in this respect (see paras 19).

(4) The plaintiff was in breach of condition 15 by using fabricated documents, and consequently submitted fraudulent and grossly

exaggerated claims in obtaining benefits under the policy. By virtue of the preamble the above breach by itself entitled the defendant to repudiate the policy; *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 referred; *United Asian Bank Bhd v Tai Soon Heng Construction* [1993] 1 MLJ 182 referred (see para 39).

(5) The defendant had made out a case for repudiation of liability under the two policies for breach of the explicit terms of conditions 15 and 12. A claim shown to be submitted with fraudulent intent, as in the instant case by submitting falsified documents and exaggerated figures, entitles the insurer to avoid liability; *Wong Cheong Kong Sdn Bhd v Prudential Assurance Sdn Bhd* [1998] 3 MLJ 724 referred (see para 41).

(6) Under the law of insurance, the insurer is entitled to insist that the claim be strictly proved, in which event the onus lies on the insured to prove its claim. A contract of insurance is one of utmost good faith or *uberimmae fidei*. Any fraudulent or exaggerated item of claim by the insured taints the entire claim and gives the insurer the right to repudiate liability. Similarly, the failure by the insured to strictly observe the deadline set for submitting claims as occurred in this case entitled the insurer to do like wises (see paras 51–52).

[Bahasa Malaysia summary

Plaintif merupakan pengeluar tekstil yang diinsuranskan bagi risiko kebakaran dan kerugian kebakaran yang berbangkit di bawah dua polisi (polisi FMD dan polisi FCL) yang dikeluarkan oleh defendan, sebuah syarikat insurans. Plaintif mengalami kerugian akibat kebakaran yang berlaku di kilang tekstil. Defendan, selepas penyiasatan, memberikan notis kepada plaintif bagi membatalkan liabiliti untuk membayar pampasan. Dengan itu, tindakan ini bertujuan memaksa defendan untuk membayar pampasan kepada plaintif bagi kerugian yang diinsuranskan. Defendan menegaskan bahawa penolakan liabiliti adalah sah atas alasan bahawa plaintif telah melanggar syarat-syarat 9(a), 12 dan 15 polisi pertama ('polisi FMD') dan syarat-syarat 8(c) dan 12 polisi kedua ('polisi FCL'). Dakwaan pelanggaran syarat-syarat ini adalah kerana defendan telah menyusun stok dan mesin jahit secara rapat dan dengan cara yang luar biasa seolah-olah untuk meningkatkan risiko kemusnahan oleh lubakaran tanpa keizinan bertulis daripada defendan. Plaintif juga dikatakan telah mengubah perdagangan atau pembuatan yang dijalankan pada atau/jenis penghunian bangunan yang diinsuranskan. Menurut defendan, plaintif telah melanggar syarat 12 dengan memasukkan dalam tuntutan mereka 'profit of any kind' dengan menambah duti import dan cukai jualan secara sengaja dengan pengetahuan bahawa mereka tidak berhak ke atas tuntutan ini kerana telah dikecualikan daripada cukai/duti tersebut. Defendan juga mendakwa bahawa plaintif telah melanggar syarat-syarat 15 dan 12 tersebut dengan menggunakan cara atau kaedah penipuan dalam menyokong tuntutan mereka dan/atau telah mengemukakan tuntutan palsu yang terlampau

dibesar-besarkan dan/atau telah menyebabkan kerugian dengan sengaja melalui perbuatan atau persubahatan ejennya. Menurut defendan, memandangkan plaintif telah menggunakan dokumen palsu atau memalsukannya, defendan berhak untuk menolak liabiliti di bawah peruntukan-peruntukan di atas.

Diputuskan, menolak tindakan dengan kos:

(1) Kegagalan plaintif untuk memberitahu defendan akan perubahan dalam hal keadaan penghunian adalah penyembunyian status sebenar perniagaan yang merupakan pelanggaran syarat 9(a) dasar FCL. Ini dengan sendirinya memberikan defendan hak untuk menolak liabiliti. Terdapat perubahan yang jelas dalam keadaan yang berkaitan untuk menduduki premis yang defendan mana tidak diberitahu. Ia tidak melibatkan liputan dasar tetapi aktiviti utama yang mana premis dihuni telah berhenti dan sejumlah besar kuantiti jentera ditinggalkan tersusun dan terbiar. Ini adalah perubahan dalam hal keadaan yang memerlukan pemberitahuan (lihat perenggan 11–12).

(2) Pihak yang diinsuranskan harus dengan segera memberikan notis kepada penanggung insurans apabila sesuatu kerugian atau kerosakan berlaku dan dalam tempoh 15 hari selepas itu, atau lanjutan masa tertentu yang mana penanggung insurans boleh membenarkan, mengemukakan suatu tuntutan bertulis bagi kerugian atau kerosakan. Jika notis telah dijadikan sebagai prasyarat bagi tuntutan di bawah polisi, syarikat insurans berhak menafikan liabiliti jika ia tidak dipatuhi. Untuk mengelakkan liabiliti di bawah polisi dalam keadaan sebegini, tiada keperluan undang-undang yang dikenakan ke atas syarikat insurans untuk menunjukkan bahawa dia telah dimudaratkan oleh ketidakpatuhan notis yang sewajarnya. Pengemukaan lewat tuntutan tersebut, melebihi tarikh 15 hari akhir, tanpa lanjutan masa yang diberikan oleh defendan, adalah satu pelanggaran jelas syarat 12 yang semestinya memberikan defendan hak untuk menolak liabiliti atas alasan ini semata-mata (lihat perenggan 13–14 & 16).

(3) Syarat 12 dengan jelas menetapkan bahawa tuntutan tersebut adalah sepatutnya untuk kerugian atau kerosakan yang berlaku. Adalah salah bagi plaintif untuk menuntut duti import yang boleh dikenakan sedangkan berkemungkinan besar, ia mungkin tidak dikenakan kerana plaintif telah dikecualikan daripada membayar duti. Dengan cara yang sama, tiada soalan cukai jualan yang dikenakan. Oleh itu, dakwaan bahawa plaintif telah memasukkan 'profit of any kind' dalam senarai tuntutan mereka telah disediakan dan telah, dengan itu, jelas melanggar syarat 12 dalam hal ini (lihat perenggan 19).

(4) Plaintif melanggar syarat 15 dengan menggunakan dokumen palsu, dan seterusnya mengemukakan tuntutan palsu dan terlampau

berlebih-lebihan dalam mendapat manfaat di bawah polisi ini. Menurut kuasa daripada *preamble* pelanggaran tersebut dengan sendirinya memberikan defendan hak untuk menolak dasar; kes *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 dirujuk; *United Asian Bank Bhd v Tai Soon Heng Construction* [1993] 1 MLJ 182 dirujuk (lihat perenggan 39).

(5) Defendan telah membuathan satu kes bagi penolakan liabiliti di bawah dua polisi kerana melanggar syarat-syarat 15 dan 12. Tuntutan yang dikemukakan yang menunjukkan niat penipuan, seperti dalam kes ini dengan memalsukan dokumen-dokumen dan mengemukakan angka yang ditokok tambah, memberikan hak kepadasyarikat insurans untuk mengelakkan liabiliti; *Wong Cheong Kong Sdn Bhd v Prudential Assurance Sdn Bhd* [1998] 3 MLJ 724 dirujuk (lihat perenggan 41).

(6) Di bawah undang-undang insurans, syarikat insurans berhak untuk menegaskan agar tuntutan tersebut dibuktikan secara ketat, di mana tanggungjawab terletak pada orang yang diinsuranskan untuk membuktikan dakwaannya. Kontrak insurans adalah sesuatu yang suci hati atau *uberimmae fidei*. Sebarang perkara yang palsu atau ditokok tambah dalam tuntutan oleh pihak yang diinsuranskan mencacatkan keseluruhan tuntutan dan memberikan syarikat insurans hak untuk menolak liabiliti. Dalam keadaan yang sama, kegagalan oleh pihak yang diinsuranskan untuk mematuhi tarikh akhir yang ditetapkan untuk mengemukakan tuntutan seperti yang berlaku dalam kes ini memberikan syarikat insurans hak untuk bertindak sewajarnya (lihat perenggan 51–52).]

Notes

For a case on repudiation of liability, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 146.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Farnham v Roval Insurance Co Ltd [1976] 1 Lloyd's Rep 449, QBD (refd)

Global Trawlers Pte Ltd v National Employers' Mutual General Insurance Association Ltd [1989] 1 MLJ 463, HC (refd)

Heyman v Darwins Ltd [1942] AC 356, HL (refd)

Insurance Corpn of the Channel Islands Ltd v McHugh and Royal Hotel Ltd [1997] LRLR 94 (refd)

Marzouca v Atlantic & British Commercial Insurance Co Ltd [1971] 1 Llyod's Rep 449, PC (refd)

Nsubuga v Commercial Union Assurance Co Plc [1998] 2 Llyod's Rep 682, QBD (refd)

Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd [1985] 1 Lloyd's Rep 274, QBD (refd)

Regina Fur Co Ltd v Blossom [1958] 2 Lloyd's LR 425, CA (refd)

Stoneham v Ocean Railway & General Accident Insurance Co (1887) 19 QBD 237 (refd)

United Asian Bank Bhd v Tai Soon Heng Construction [1993] 1 MLJ 182, SC (refd)

Wong Cheong Kong Sdn Bhd v Prudential Assurance Sdn Bhd [1998] 3 MLJ 724; [1996] 1 CLJ 916, HC (refd)

Legislation referred to

Evidence Act 1950 ss 45, 114(g)

T Gan (Gan & Lim) for the plaintiff.

Tengku Farik Ismail (Tan Sixin with him) (Azim, Tunku Farik & Wong) for the defendant.

Gunalan Muniandy JC:

BACKGROUND OF THE PLAINTIFF'S CLAIM

[1] This is a suit for compensation based on a fire insurance policy arising out of a fire that burned down the plaintiff ('P') textile factory. P, a textile manufacturer, was insured against risks of fire and fire consequential losses under two policies issued by the defendant ('D') an insurance company. P sustained losses as a result of a fire that took place on 12 October 2005 at its. factory in Pasir Gudang, Johor which is the subject of the present claim for a sum of over RM4.8m.

[2] D was duly notified of the fire following which it appointed loss adjusters, Crawford and Co Adjusters (M) Sdn Bhd to do a valuation on the losses that P had suffered. P then on 27 January 2006 served on D a formal claim for compensation under the above two policies. D, however, on 16 November 2006, gave written notice to P repudiating liability to pay compensation as claimed by the latter. Hence, this suit to compel D to pay compensation to P for the losses insured against.

DEFENCE

[3] While conceding that the fire occurred during the period of coverage,of thersaid policies and that a claim thereof had been duly lodged, P put D to strict proof to prove that the fire was accidental and/or fortuitous in nature.

More importantly, D pleaded that the claim submitted by P as per the statement of claim ('SOC') was fundament and/or grossly exaggerated.

[4] D averred that the repudiation of liability was valid on the ground that P had infringed conditions 9(a), 12 and 15 of the first policy ('FMD Policy') and conditions 8(c) and 12 of the second policy ('FCL Policy').

ANALYSIS AND FINDINGS

Condition 9(a) of FMD policy & 8(c), FCL policy

[5] The allegation of breach of these conditions was by reason of D stacking stocks and sewing machines very closely and in an unusual way such as to greatly increase the risk of destruction by fire without proper written sanction from D. P was said to have altered the trade or manufacture carried on or/nature of occupation of the building insured.

[6] It was printed on the policy schedule of both the policies:

> Policy Occupancy: Garment Factory
>
> Policy Occupancy Class: Garment Makers.

[7] Subsequently an endorsement, was done on the FMD policy amending the occupancy to 'Garment Makers', importer and exporter, warehouse and wholesaler. The original occupancy in the FCL policy remained as no similar endorsement was requested for.

[8] The evidence that P had ceased manufacturing at the premises was not seriously disputed. It was supported by the fact that all the sewing machines were stacked up on racks two and three (see sketch-plan in D's forensic report). D's forensic expert said that the location was most unusual as the heavy machines had been placed at a most peculiar location on the very tops of the racks which was a very difficult move. According to him, it raised the suspicion that the purpose was to ensure their destruction. D submitted that the absence of access to them proved that P had no longer any intention to carry out manufacturing as was admitted by P's main witness (PW2) who said that the sewing that P did was to 'give some to others for processing'.

[9] D contended that P had not obtained any sanction from D for the above material change of circumstances in occupancy, ie, the cessation of manufacturing garments and the stacking of the sewing machines on the racks.

Further, that the manner of stacking up on one rack only and not spreading them throughout the factory greatly increased the risk of destruction in one go in the event of a fire.

[10] In insurance law, where the alteration in the usage of the premises is in such a manner that would aggravate or increase the risk of damage when fire occurs it would be a breach of the fire policy if it contains a condition similar to our condition 9(a) (see *Farnham v Royal Insurance Co Ltd* [1976] 1 Lloyd's Rep 449; *Marzouca v Atlantic & British Commercial Insurance Co Ltd* [1971] 1 Llyod's Rep 449).

[11] I agree with D's contention that P's failure to duly notify P of the alteration in the circumstances of occupancy as referred to above was a concealment of the actual status of the business which would constitute a breach of the clear terms of condition 9(a) of the FMD policy/8(c) of the FCL policy. This by itself would entitle D to repudiate liability under these policies as compliance with all the stipulated conditions was a condition precedent for coverage under the policies.

[12] P contended that D's contention on the change of occupancy was erroneous because the subsequent endorsement to the FMD policy was wide enough to cover import, export, warehouse, etc and was not confined to manufacturing garments. I did not find any merit in P's contention because the point being made was that there was an obvious change in circumstances pertaining to occupation of the premises as to which D had not been duly notified. It did not concern coverage of the policy but that the main activity for which the premises were occupied had ceased and a large quantity of machinery was left stacked and idle. This was definitely a change in circumstances that required notification.

Condition 12, FMD policy

[13] By virtue of the above, the insured had first to forthwith give notice to the insurer when a loss or damage happens and within *15 days* after that, or such further time that the insurer may allow, submit a written claim for the loss or damage containing in particular an account as may be reasonably practicable the details of the damage and amount of the loss or damage, excluding of profit of any kind.

[14] Where notice has been made a condition precedent for a claim under a policy, the insurer would be right to deny liability if it is not strictly complied with. As explained by *Poh Chu Chai on the Law of Insurance* (5th Ed) at p 821:

A term requiring an insured to give a notice of loss to an insurer must be made a condition precedent to liability of the insurer before the insurer is entitled to disclaim liability of the loss. In other words, the liability of an insurer to indemnify an insured under the policy is made to depend on the insured fulfilling his duty to give notice of the loss to the insurer (see *Stoneham v Ocean Railway & General Accident Insurance Co* (1887) 19 QBD 237).

In order to avoid liability under the policy in this instance, no necessity in law is imposed on the insurer to show that he has been prejudiced by the said non-compliance of due notice (see *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274).

[15] P's list of claim was only received by Crawford on 12 April 2006 (see Crawford's Final Report — *exh D93*) which was almost six months from the date of incident. There was no record of P having applied for and being granted an extension of time by D to submit its claim. P's answer to the non-compliance with condition 12 was that P took steps to promptly notify D by its letter of 18 October 2005. Six days after the incident (*exh P2*) stating that P intended to make a 'full loss claim'. Further, that P had been purchasing fire insurance policies from D for many years and had never previously made any claim. After the fire, ('A term requiring an insured to give a notice of loss to an insurer must be made a condition precedent to liability of the insurer before the insurer is entitled to disclaim liability for the loss. In other words, the liability of an insurer to indemnify an insured under the policy is made to depend on the insured fulfilling his duty to give notice of the loss to the insurer.' (see *Stoneham v Ocean Railway & General Accident Insurance Co* (1887) 19 QBD 237). In order to avoid liability under the policy in this instance, no necessity in law is imposed on the insurer to show that he has been prejudiced by the said non-compliance of due notice (see *Pioneer Concrete (UK) Ltd v National Employers Mutual General insurance Association Ltd* [1985] 1 Lloyd's Rep 274). D's adjuster ('DW2') was at the premises for investigation and was duly given ail the required information which would have enabled him to do a verification with the Customs Department but he failed to do so. Finally, that P2 was a notice of loss 'as may be reasonably practicable' compared to Crawford who took a year to complete their report.

[16] With respect, I did not see how the above facts could be a ground for dispensation of compliance with the mandatory requirement of claim for loss within 15 days. To begin with P2 could by no stretch of language be considered a claim as envisaged in condition 12. It could amount to no more that a notice of intention to make a full loss claim. The late submission of the claim, well in excess of the 15 day deadline, without further time being given by D, was a clear-cut breach of condition 12 that certainly gave D the right to repudiate

liability on this ground alone. Whether it was unconscionable under the circumstances of the case for D to allege breach of condition 12 was an irrelevant factor.

[17] It was also D's case that P had breached condition 12 by including in their claim 'profit of any kind' by adding in it import duties and sales tax deliberately knowing that they were not entitled to this claim as they had been exempted from such tax/duty. The exemption was by virtue of their license as a 'licensed manufacturing warehouse' ('LMW') under which the Customs Department exempted them from paying the said import duty. P's total claim of over RM4.9m included import duty and sales tax amounting to almost RM1m. As there was no possibility of re-export to third countries, the question of imposition of sales tax did not arise. D's counsel ('D/C') rightly pointed out that they (P) had throughout the entire trial not provided any proof that they had paid any of the sales tax and import duties that were part of their list of claim.

[18] P contended that as the imported materials had all been destroyed in the fire and could not be manufactured, the Customs Department would impose import duties that P would be liable to pay. This was pure speculation without any evidential basis in support of the fact asserted. As for sales tax, there was absolutely no mention whatsoever at the trial that the tax was payable by P. On this score, D/C submitted that P had deliberately and knowingly inflated their insurance claim by at least 20% through inclusion of the sales tax and import duties that had not been proven to have been paid or to be payable.

[19] The short answer to P's contention would be that condition 12 explicitly stipulates that the claim should be for loss or damage that happens. I agree with the defence argument that it was wrong for P to claim for import duties that may be imposed when in all likelihood, it may not be imposed as P was exempted from paying the duties by reason of being a manufacturer. There was absolutely no proof that the duties would be imposed due to the goods destroyed in the fire being incapable of being manufactured. By the same token, there was no question of sales tax being imposed as there was no possibility of re-export of goods manufactured from the imported materials. Hence, I held that the assertion that P had included 'profit of any kind' in their list of claim had been made out and had, thereby, clearly infringed condition 12 in this respect.

Conditions 15 of the FMD and 12 of the FCL policies

[20] Both conditions are identical. For cease of reference, they read as follows:

> If the claim be in any respect fraudulent, or jf any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the willful act, or with the connivance of the Insured;… *all benefit under this Policy shall be forfeited.*

[21] From a literal reading of these conditions, it appears clearly that breach of any one limb would occasion the risk of all benefits under the policy being forfeited. The insurer would, therefore, be entitled to reject liability under the policy. It is also beyond dispute that the FCL policy would only respond if the FMD policy responds to the claim which is explicit in the preamble of the former.

[22] The defence argued strenuously that there was ample evidence disclosing that P had breached the said conditions 15 and 12 by using fraudulent means or devices in support of their claim and/or had submitted. A fraudulent claim that is grossly exaggerated and/or had occasioned the loss by its agents' willful act or connivance. The issue raised may be considered under the following heads.

Fraudulent means or devices

[23] The defence case on this issue was that as P in support of their insurance claim against D had used fake or falsified documents, D was entitled to repudiate liability under the above provisions.

[24] First and foremost, D referred to certain invoices tendered as ID only to support their claim but P took us steps to prove the invoices purportedly issued by either calling the makers or suppliers. It is trite law that documents tendered for identification must be properly proved in accordance with the rules of evidence in order to be admitted into evidence and taken into consideration. As such, D asked that these invoices marked as *ID13–14, ID17–18, ID41–45, ID47, 1D50–59 and ID61–65* be rejected as evidence.

[25] Also that all these documents should be totally disregarded in view of their stand in the defence as pleaded attacking the veracity of the relevant supporting documents on the ground that they are suspect. According to D's submission, the failure to prove these documents fortified the allegation that they were not genuine but designed to deliberately inflate P's claim.

[26] D challenged the witnesses called from certain suppliers to prove the claim of the stock and machinery asserted to have been in the premises during

the incident on the ground the both the documents and the witnesses were very delicious. These suppliers were:

(a) Hangzhou Hua Hong Garments Interprising Co Ltd ('Hangzhou');

(b) Ningbo Zhongsheng l/E Co Ltd ('Ningbo');

(c) Familiar Investment Holding Pte Ltd ('FIH'); and

(d) Tarmah Machinery Sdn Bhd (TM).

Hangzhou

[27] The witness produced by P ('PW8') testified that exhs *P85/85A* and *P86/86A*. marked as such subject to submission on their admissibility, were the invoices and packing lists purportedly issued by Hangzhou. During cross-examination, evidence was elicited from him that he did not understand English and as such, could not understand the contents of these documents. More importantly, that he was not the maker and was not in charge of preparing the documents. Neither could be give any explanation why the relevant customs declaration forms showed that the goods were loaded in Singapore and not in China if the goods had in fact been exported from China. Essentially, he was unable to answer the defence suggestion that the invoices were fabricated.

[28] Based on PW8's own evidence, particularly that he had no personal knowledge of the above exhibits and was not the maker, it was plainly clear that PW8 was not a competent witness through whom these exhibits could be validly tendered as evidence. Hence, the submission that *exhs P85/85A and P86/86A* should be disregarded as evidence had to be upheld.

Ningbo

[29] P's witness from this company in China (PW10) testified on exhs P21–22, P25–26 and P29–30. which were marked as exhibits subject to proof on authenticity and contents. Although PW10 could not understand English she could read the invoices with some difficulty. Although she claimed that Ningbo exported goods worldwide, except for Africa, she could not explain why the invoices had no contact numbers of any kind such as telephone/fax numbers, email address, etc.

[30] PW10 also could not produce the bills of lading in respect of the invoices which the defence asked for as proof of shipment of the goods in question to Malaysia. The invoices were all dated May–June 2006 but until the fire which occurred some four months later no payment had been received

from P and strangely, no effort had been made by Ningbo to demand payment. It was only about six years later that judgment in default ('JID') was entered against P for the sum of USD429,145.81. No previous attempt was made to collect the huge debt for deliveries made six years ago. D submitted that P&S act is allowing the JID to be entered was on elaborate scam to defraud the insurer based on PW10's admission that the arrangement was to settle the judgment debt only after payment to P by the insurers (D). Whether or not it was a scam or not, PW10's evidence indeed revealed circumstances that were indeed suspicious and cast doubts as to the veracity and genuineness of the invoices as well as on her credibility. In all probability, the invoices and packing lists that she sought to tender were fabrications designed to support the present insurance claim. D/C, in urging the court to reject her evidence, pointed out that as the alleged deliveries were made in or around May 2005, and the fire occurred several months later, PW10 was in no position to know whether the same goods were destroyed in the fire, placed elsewhere or had been re-exported.

Familiar Investment Hoding Pte Ltd ('FIH')

[31] The above is the company that issued invoices *exhs P33 and P36* which P sought to tender by calling PW6, a director of Familiar Investment Holdings Pte Ltd, the slight but material difference in name being a subject of serious dispute in this case. The latter was a registered company shown to exist in Singapore and according to PW6, had issued P33 and P36, but the former bearing the name stated was non-existent. So was the company address stated in P33 and P36, ie, No 6A, Circular Road, Singapore. D's adjuster (DW1) gave evidence that the company that issued P33 and P36, Familiar Investment Holding Pte Ltd ('FIH') could not be located at the said address, which had been occupied by a firm carrying out an unrelated business for 7–8 years. PW6's explanation that the discrepancies in both the name and address of the company were printing errors was not credible or acceptable. Amongst others, the company name said to be an error appears at both the heading and signature portions of P33 and P36 as well as exh P37, which is a Customs Department document. The same goes for the non-existent address which is present in all these documents. The memorandum and articles of FI Holdings Pte Ltd (*exh P83*) did not contain any address. In photographs exh P7(d)–(e), which according to PW2 showed the correct address in Singapore, 'No 16A, Circular Road', there is no signage of either company but only one 'Tai Tat Co.' Apart from the address in the invoices said to be incorrect, there was no documentary proof of the correct address of either company.

[32] From the above evidence surrounding the non-existence of both the company named and the address in both P33 and P36, the only irresistible conclusion, on a preponderance of probabilities, was that it was no error as

alleged but by design to submit fabricated documents in support of this claim.

Tarmah Machinery Sdn Bhd ('TM')

[33] PW5 from TM testified that *exh P39* was an invoice issued by-one Hong Lin Sewing Machine Pte Ltd of Singapore ('HL') while *exh P40* was a delivery order ('DO') issued by TM. PW5, however, confirmed under cross-examination that he did not have any letter of authority from HL to testify on their behalf and neither did he know who had signed P39 of which he was not the maker. As rightly submitted by the defence, PW5 was, thus, not a competent witness to testify on the contents of P39 and his evidence thereof should be excluded, inter alia, on the ground of hearsay.

[34] The crux of PW5's evidence was that he had personally delivered 127 new sewing machines to P. D submitted that this evidence could not possibly be true because, firstly, their adjuster ('DW1') said that his enquiries with Pegasus Singapore, the distributor of the machines, showed that some of the models listed in P39 were obsolete and production had been discontinued. His initial enquiries with the assistant general manager of HL revealed that P39 was not their invoice. Secondly, both PW1 and PW2 admitted in their witness statements ('PWS1 & PWS2') unequivocally that P had in July 2005 purchased *used* sewing machines from HL. The admissions were consistent with D's forensic report (*exh D97*) which confirmed that some of the models of the machines damaged were old, ranging from 10–30 years, six of which had the letters 'RMC' stamped on them and one had stamping running over its original serial number. The facts supported the allegation that PW5's evidence and P's claim that all 127 sewing machines were new could not be true. As exh P39 was hotly disputed as to its authenticity and PW5 was not its maker, the contents of P39 should rightly be disregarded as proof of purchase of the goods for which there was also no proof of payment. It was the same for exh P40 ('delivery order') as proof of delivery of the goods. In the circumstances, P's failure to call an appropriate witness from HL to prove the authenticity of P39, the truth and contents of which were challenged, was the subject of an adverse inference being invoked under s 114(g) of the Evidence Act.

[35] The submission that the statements by PW1 and PW2 in PWS1 and PWS2 regarding the sewing machines being *used* were typographical errors by the firm of P's solicitors was untenable. Both witnesses had said so unequivocally without reservation in their sworn witness statements ('PWS1' and 'PWS2') which were duly read over to them, who then confirmed that all the contents were true. The explanation of counsel from the Bar that the errors were by his firm was most inappropriate. The contents of PWS1 and PWS2 were the sworn oral evidence of the witnesses and should not be allowed to be

altered on material facts after affirmation. In any event, the proposed alteration went against the tenor of particularly PW1's evidence on this point. This is what he said:

> Yes, the Plaintiff bought about 127 *used* sewing machines in July 2005 and I was asked to test them when they arrived. Thereafter, my job was to test and carry out service and repair (if necessary to repair).

It was obvious, as pointed out, that if the machines were new, there was no necessity for PW2 to do the above job, especially the repair. It would be the responsibility of the supplier to ensure that the machines were in good working order and provide the usual warranty. The weight of evidence clearly pointed to the fact that the machines were *used* and that the admissions by PW1 and PW2 as above were the truth and not typographical errors.

[36] Similarly, the evidence of PW1 that the 'RMC' stamps on six of the sewing machines were the work of some mischievous workers of P playing with rubber-stamps was most incredible and unconvincing. Suffice to say that it was not at all likely to be true but showed the lengths that PW1 would go to support the veracity of his claim, which appeared more likely than not to be exaggerated and not completely truthful. The letters 'RMC' were clearly not rubber-stamped but permanently embossed on the machines.

[37] Based on the above evidence and the fact that *exhs P39 and P40* were not properly admitted into evidence by calling the maker, I upheld the defence submission that these exhibits should be disregarded as mere fabrications. Apart from proof of payment not being produced, the reluctance to properly prove P39 by calling the maker raised suspicions as to its genuineness. If the invoice is found to be false, the delivery order (*exh P40*) has also to be regarded as false.

[38] Apart from the lack of credibility and unreliability of the evidence of P's witnesses as highlighted above, DW2, a chartered loss adjuster and general manager of Crawford, concluded in his report (*exh D93*) based on his personal investigations that the invoices from Familiar, Ningbo and Hangzhou were all suspect. His conclusions on the discrepancies in these documents were hardly challenged or contradicted in cross-examination. He was convinced especially that the two invoices from Familiar were clearly falsified documents. As for the purported exports from China, his finding was that the various transactions supported by the unproven invoices were not genuine. Amongst others, P had failed to provide the documents requested for showing the chain of delivery of the products from China to P's premises, such as the bill of lading from the source in China. P gave the excuse that the China suppliers were uncooperative. Yet, he managed to call witnesses purportedly from the

suppliers to support his claim. It has to be reiterated that the competency of these witnesses to give credible evidence was highly questionable.

[39] Based on my analysis of the above evidence as a whole, I found sufficient grounds to hold that P was in breach of condition 15 by using fabricated documents, and consequently submitted fraudulent and grossly exaggerated claims in obtaining benefits under the policy. There was, in my finding, enough evidence to hold that D had, on a balance of probabilities, proved fabrication of the supporting documents as alleged. The standard of proof of fabrication or forgery in civil case, even though high, is on a balance of probabilities. In the Federal Court case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 it was held:

> … we entirely agree that the standard of proof required to prove forgery in civil cases is one on a balance of probabilities.

(See also *United Asian Bank Bhd v Tai Soon Heng Construction* [1993] 1 MLJ 182 at p 188).

By virtue of the *preamble* the above breach by itself entitled D to repudiate the policy.

[40] The defence submitted various authorities on the insured's duty to act in good faith and that an element of fraud in relation to a claim would taint the whole claim and render it liable to be rejected. It would be useful to refer to the following passage from *Nsubuga v Commercial Union Assurance Co Plc* [1998] 2 QBD 682 where Mr Justice Thomas cited with approval Mr Justice Mance's judgment in *Insurance Corpn of the Channel Islands Ltd v McHugh and Royal Hotel Ltd* [1997] LRLR 94 and held (at p 686) that:

> I agree with what Mr Justice Mance says, if there is fraud in relation to a claim, then that clause operates not merely in relation to the section of the policy in respect of which the fraud has occurred but to all sections of the policy … The position at common law can be summarised as follows:
>
> (1) *A person who has made a fraudulent claim would not be permitted to recover at all …*
>
> (2) *If a claim is fraudulently inflated so that the claim is made in an amount which the plaintiff clearly knows he has not suffered that will amount to a fraudulent claim and will have the same effect ….*

[41] In the circumstances, I found that, on the totality of the evidence adverted to, D had made out a case for repudiation of liability under the two policies for breach of the explicit terms of conditions 15 and 12. A claim shown to be submitted with fraudulent intent, as in the instant case by submitting falsified documents and exaggerated figures, entitles the insurer to avoid

liability. In *Wong Cheong Kong Sdn Bhd v Prudential Assurance Sdn Bhd* [1998] 3 MLJ 724; [1996] 1 CLJ 916, Vincent Ng J in explaining the concept at p 731 (MLJ); p 921 (CLJ) *uberimae fidei* in insurance contracts quoted the following passage, from Raoul Colinvaux in the *Law of Insurance*:

> One of the consequences of the principles that a contract of insurance is one of the utmost good faith (see *Heyman v Darwins* [1942] AC 356 at p 365) is that *fraudulent claims made under it give the insurers the right to avoid* (see *Stebbing's case* [1917] 2 KB 433 at p 438) *the whole policy. Thus, if the assured makes a fraudulent claim, he cannot recover at all* (see *Norton v Roval* [1885] 1 TLR 460), and conditions in the policy to this effect (see *Jureidini v National British* [1915] AC 499) are declaratory of the legal position without them. …*The most common examples … grossly exaggerated claims* … such exaggeration will amount to fraud if it is dishonestly made, or so greatly in excess of the true amount as to be incompatible with good faith (see *Chapman v Pole* (1870) 22 LT 306).

[42] D/C also referred to *MacGillivray on Insurance Law* (11th Ed), 2008, Sweet & Maxwell, at pp 549–550, where the principle is explained as follows:

> … *in many cases a fraudulent intent can properly be inferred from the presentation of a deliberately inflated claim* … An assured who antedated a cheque for the premium to a date before the loss was held to have used a (fraudulent device;in order to obtain a benefit under a policy (*Newis v General Accident Fire & Life Ass Corp* (1910) 11 CLR 620), as was another who tried unsuccessfully to promote his claim on a fire insurance policy by saying falsely that he had no intention of selling his house which had burned down, thereby hoping to allay suspicions of arson. (*Stenson v AMP General Insurance (NZ) Ltd* [2006] Lloyd's Rep IR 852, 858–859).

[43] In view of the evidence of falsification or forgery of the relevant supporting documents, serious doubt emerged whether the goods and machinery stated in these documents which were part of the insurance claim were actually destroyed in the fire. Knowingly submitting grossly exaggerated claims against the insurer (D) by falsification of invoices, for which there was sufficient evidence in this case on a balance of probabilities, is in clear breach of condition 15 of the FMD Policy. This condition is, apart from being an express term of the policy, more essentially a condition precedent to D's liability under the policy, the breach of which ipso facto entitled D to repudiate liability thereof.

FIRE LOSS — WHETHER OCCASIONED BY THE WILLFUL ACT/CONNIVANCE OF P OR ITS AGENTS

[44] This was among the main grounds raised by D for repudiating liability under the FMD and FCL. It was alleged that the fire itself was not the result of natural or accidental causes but arson through the connivance of P themselves.

Simply put, that it was deliberate and not an unforeseen incident as alleged by P. While there was no doubt that the fire occurred and burned down the factory, none of P's witnesses could give evidence on how it occurred. The main witness (PW1), P's managing director, was away on business in China at the time of the incident and was only informed about it through telephone. P could not produce as witness its supervisor who had on the night of the incident locked the premises on the ground that he had since passed away. He was obviously the best person to testify on the circumstances prevailing at the premises at the crucial point in time. Yet, no evidence was produced to prove that he had passed on after the incident. No other evidence was led as to how the fire started and spread quickly.

[45] The court was, thus, left with opinions from both parties' experts as to the origin and cause of the fire. They were at variance with each other in their findings on this vital issue. The forensic specialist appointed by D, one Mr Barry Dillon ('DW3'), who was called as an expert witness, concluded that the fire was started deliberately at P's premises through the involvement of someone with legitimate access to the premises (see DW3's report — *exh D96*). The last person who had such access was P's supervisor who was not called to give evidence on this crucial fact in issue. DW3 and DW2 had made a site inspection to the premises immediately after the incident and hence, were in a position to give first hand evidence on the situation then prevailing in the aftermath of the incident. This is to be compared with the evidence of P's expert ('PW3') who never visited the scene but merely made comments and conclusions after reading DW3's report some five years thereafter. The relevant evidence from the reports of DW2 and DW3 to support their conclusions on the cause of fire is summarised in the defence submission as, inter alia:

(a) There were 2 *distinct* and *separate* seats of fire at the Plaintiff's premises;

(b) All *accidental* causes of fire have been eliminated;

(c) The Plaintiff's premises was properly secured prior to the fire by Mr Eng Yu Chong ('PW2') on 9.10.2005 and the only 2 sets of keys were given to a director of the Plaintiff, one Mr Low Chew Chee. This was also confirmed by PW2 in cross examination at NOE p 17. As the premises were secured, the Bomba had to break into the premises and there was no evidence of a *pre-fire break-in.* This is confirmed by DW2 in the Adjusters report at Exhibit D93 Bundle 'C p 7 which states, 'At the time of our initial site inspection, we noted the locks securing the front roller shutter, and the rear metal grille door/timber door at risk building No. 21 were forced open by the firemen to facilitate fire fighting operation'; and

(d) Mr Low Chew Chee ('LCC') had the keys to the Plaintiff's premises since PW2 was in China at the time of the fire.

D/C submitted that despite the serious allegations made against LCC, who is purportedly deceased, and the other shareholders and/or directors of P who

had a motive is burning down the premises, no effort was made to call any of them to rebut the allegations. As such, it was urged that on adverse inference be drawn against P under s 114(g) of the Evidence Act for this failure and the withholding of evidence that was available. Further, that the expertise and experience of DW2 and DW3 were not seriously challenged by P in cross-examination and neither were their testimonies and reports disproved by way of cross-examination or rebuttal evidence from P's witnesses ('PW2', 'PW3' and 'PW4').

[46] PW4 (representative from the Fire Brigade) who prepared the Bomba report (*exh P12*) was among the witnesses called to challenge DW3's findings and to prove that the fire was caused by electrical failure. PW4 was clearly not an expert witness in the field of electric power or electrical systems to give expert opinion on this issue that could be received as evidence of a person specially skilled in the field concerned under s 45 of the Evidence Act. PW4 admitted that the cause of the fire had not been confirmed and that it was merely his opinion, based solely on visual inspection of the premises at the time. His opinion was wholly unreliable and far from capable of disproving the conclusion reached by DW2 and DW3. Their conclusion was, thus, not shown to be wrong.

[47] P's most important witness on the present issue was Mr Harcharan Singh Tara ('PW3') a retired senior government chemist with impressive credentials. Be that as it may, and leaving aside his level of experience in this field as compared to that of DW3, who had investigated more than 1000 fires, the crucial fact was that he had never inspected the site of incident and made his conclusions only by reading DW3's report some five years later. It was open to question how much reliance could be placed on his opinions compared to those of DW2 and DW3 who had made a thorough and comprehensive inspection of the premises even before the fire had died down. I upheld the defence submission that more weight should be placed on the evidence of DW3 as it was contemporaneous with the incident and likely to be more accurate as to the fact that the fire was deliberate in nature.

[48] Despite the weight of evidence being in favour of D's case that the fire was deliberate, counsel for P ('P/C') submitted that the evidence did not show precisely how the fire started and the court at the conclusion of the case was left in grave doubt as to its actual cause. By reference to the case of *Global Trawlers Pte Ltd v National Employers' Mutual General Insurance Association Ltd* [1989] 1 MLJ 463 he submitted that in this situation P as the insured was entitled to the benefit of the doubt. It was held in that case:

> Having reviewed the evidence of both the experts I am *still left in grave doubt* as to where and *how precisely the fire started.* But the *burden* of proving that the fire was caused by the willful act of the plaintiffs or with their connivance lies with the first defendant.

And further at p 470:

> In my judgment, *once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case* and the onus is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff. Accordingly if at the end of the day the jury comes to the *conclusion that the loss is equally consistent with arson as it is with an accidental fire,* the onus being on the defendant, the *plaintiff would win on that issue.* (Emphasis added.)

[49] It would appear from the Federal Court judgment in the landmark case of *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 that the alleged commission of arson in respect of a fire insurance claim is akin to a fraudulent claim so that the beyond reasonable doubt standard of proof would apply. The relevant part of the judgment states:

> It is now settled law that the standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on balance of probabilities (see *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC)). The claim by the Court of Appeal that the chain of circumstantial evidence proves beyond reasonable doubt the alleged commission of arson is legally untenable.
>
> At most the respondent succeeded in creating a suspicion in the cause of the fire by arson. Suspicion, however great, is insufficieny to prove fraud which needs to be proved beyond any reasonable doubt. In this case, the respondent, being the insurer, has not discharged the onus of proof of the charged fraud and the appellant, being the assured, therefore must succeed.

[50] To conclude on this issue, suffice to say that having reviewed the entire evidence, with due emphasis on the findings, opinions and conclusions of both parties' experts, I could not hold that D had proved beyond reasonable doubt that the fire was caused by arson through the willful act of P and/or its agents or with their connivance. There was, however, a strong probability of the allegation being true. In fact, DW3 himself conceded candidly that his conclusion was based on observations at the scene and that he could not determine the point of origin of the fire due to the massive damage.

CONCLUSION

[51] Under the law of insurance, the insurer is entitled to insist that the claim be strictly proved, in which event the onus lies on the insured to prove its claim (*Regina Fur Co Ltd v Blossom* [1958] 2 Lloyd's LR 425).

[52] A contract of insurance is one of utmost good faith or *uberimma fidei* (see *Heyman v Darwins Ltd* [1942] AC 356 at p 365). Any fraudulent or exaggerated item of claim by the insured taints the entire claim and gives the

insurer the right to repudiate liability. Similarly, the failure by the insured to strictly observe the deadline set for submitting claims as occurred in this case entitled the insurer to do like wises.

[53] In this case, irrespective of whether the fire was accidental or caused by arson, there is, in my finding, clear evidence of the claim being dishonestly exaggerated by falsification of at least some of the documents tendered to support the claim. Falsification or forgery, compared to fraud, has to be proved only on a balance of probabilities. P's act is in clear breach of condition 15 of the FMD policy and condition 12 of the FCL policy. Even if the court is wrong on this finding, P has breached condition 12 of the FMD Policy. I am compelled to hold that, as observance of all the stipulated conditions, is a condition precedent for recovery by the insured under both policies, it was right and lawful for D to repudiate liability under both the policies.

[54] In view of the foregoing, I held that D had successfully raised a valid defence to P's claim for compensation under the policies. This suit had, therefore to be dismissed with costs.

Suit dismissed with costs.

Reported by Kanesh Sundrum